MOTION FOR NEW TRIAL/MOTION TO VACATE JUDGMENT/POST-CONVICTION RELIEF – Claims of "newly discovered evidence" under Rule 24.2(a)(2) and Rule 32.1, Arizona Rules of Criminal Procedure – Revised 11/2009

Motions for new trial based on newly discovered evidence are disfavored, and courts grant them only cautiously. *State v. Soto-Fong*, 187 Ariz. 186, 195-96, 928 P.2d 610, 619-20 (1996); *State v. Saenz*, 197 Ariz. 487, 490 ¶ 13, 4 P.3d 1030, 1033 (App. 2000). However, under Rule 24.2(a)(2), Ariz. R. Crim. P., a trial court may vacate a judgment on the defendant's motion alleging that "newly discovered material facts exist."[1]

The Comment to Rule 24.2 states that the defendant "may allege newly discovered evidence, as that phrase is defined in Rule 32," in seeking to vacate the judgment. A defendant may obtain post-conviction relief under Rule 32.1(e), Ariz. R. Crim. P., if "newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." That subsection states:

> Newly discovered material facts exist if:
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> (1) The newly discovered material facts were discovered after the trial.
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> (2) The defendant exercised due diligence in securing the newly discovered material facts.
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> (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

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1 Rule 24.2(a)(2). Motion to vacate judgment.

(a) Grounds for Motion. Upon motion made no later than 60 days after the entry of judgment and sentence but before the defendant's appeal, if any, is perfected, the court may vacate the judgment on any of the following grounds:

(2) That newly discovered material facts exist, under the standards of Rule 32.1; . . .

Under Rule 32, Ariz. R. Crim. P., a post-conviction relief petitioner is only entitled to an evidentiary hearing if he presents a colorable claim, that is, a claim which, if his allegations are true, might have changed the outcome. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990); *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988); *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). A newly discovered evidence claim is colorable only if all five of the following requirements are met:

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
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> (2) the petition must allege facts from which the court could conclude the petitioner was diligent in discovering the facts and bringing them to the court's attention;
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> (3) the evidence must not simply be cumulative or impeaching;
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> (4) the evidence must be relevant to the case; and
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> (5) the evidence must be such that it would likely have altered the verdict, finding or sentence if known at the time of trial.

State v. Orantez, 183 Ariz. 218, 221, 902 P.2d 824, 827 (1995); *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989); *State v. Mauro*, 159 Ariz. 186, 207, 766 P.2d 59, 80 (1988). All five of these requirements must be met for a newly discovered evidence claim to justify relief. The most important question is whether admission of the “new” evidence would have changed the outcome of the defendant’s trial. *State v. Morrow*, 111 Ariz. 268, 270, 528 P.2d 612, 614 (1974); *State v. Dunlap*, 187 Ariz. 441, 466**,** 930 P.2d 518, 543 (App. 1996).

THE FIVE REQUIREMENTS FOR “NEWLY DISCOVERED EVIDENCE”

1. The evidence must have existed at time of trial but not be discovered until afterward.

The first requirement for "newly discovered evidence" is that it must have existed at the time of trial, but not be discovered until after trial. *State v. Saenz*, 197 Ariz. 487, 489**,** 4 P.3d 1030, 1032 (App. 2000). As the Court of Appeals said in *Saenz*, if the defendant knew of the evidence before the trial, it is irrelevant that he did not inform his counsel about it:

> "Evidence known to the defendant is not newly discovered, even if it is not known to his counsel." [Citations omitted.] As the New Mexico Supreme Court has observed, "It would work havoc on the system if we held that information possessed by the defendant during the trial is 'newly-discovered' when revealed by him after the trial." *State v. Mabry*, 96 N.M. 317, 630 P.2d 269, 275 (N.M.1981).

Id., 197 Ariz. at 490-91 ¶ 13, 4 P.3d at 1033-34. In addition, evidence concerning information a witness possessed at trial, but about which she was never asked, also is not "newly discovered." *State v. Jeffers*, 135 Ariz. 404, 427, 661 P.2d 1105, 1128 (1983).

2. The defendant must have used due diligence to discover the evidence and to bring it to his attorney's attention before trial.

"Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *Saenz*, 197 Ariz. at 490 ¶ 13, 4 P.3d at 1033. When a defendant knows of the existence and identity of a witness before trial and makes no effort to obtain the witness's testimony, the witness's testimony will not ordinarily justify a new trial. *Jeffers*, 135 Ariz. at 427, 661 P.2d at

1128. In *Saenz*, *supra*, the defendant claimed as newly discovered evidence the fact that someone else had confessed to the murder. Although the defendant knew of the confession before trial, he did not inform counsel until shortly before sentencing. The *Saenz* court held that the defendant did not exercise due diligence to bring the information forward before trial and therefore denied his motion for new trial.

3. The evidence must not be simply cumulative or impeaching.

a. Cumulative evidence

Cumulative evidence is evidence that merely augments or tends to establish a point already proved by other evidence. *State v. Turner*, 92 Ariz. 214, 221, 375 P.2d 567, 571 (1962); *State v. Kennedy*, 122 Ariz. 22, 26, 592 P.2d 1288, 1292 (App. 1979).[2] In *State v. Soto-Fong*, 187 Ariz. 186, 196, 928 P.2d 610, 620 (1996), the defendant sought a new trial alleging newly discovered evidence, namely, the testimony of a codefendant at his own trial, after Soto-Fong's murder trial was completed. The Arizona Supreme Court found that most of the codefendant's testimony was merely cumulative because it simply reiterated the defendant's claims that he was not involved in the crimes. *Compare State v. Orantez*, 183 Ariz. 218, 902 P.2d 824 (1995). In *Orantez***,** the defendant was convicted of kidnapping and sexual assault. He moved for a new trial claiming he had newly discovered evidence that the victim was under the influence of heroin and cocaine at the time of the crime and was engaging in prostitution to support her drug habit, and had lied about both of those facts during her trial testimony. The

2 *See also* Rule 403, Ariz. R. Evid., which states in part:

> Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless

defendant presented testimony to that effect, but the State argued that the victim's credibility had already been impeached because she had already admitted lying to police about other things. The trial court denied his motion to vacate the judgment and the defendant appealed. The Arizona Supreme Court found that evidence of lying about drug use was not cumulative because the victim's drug use could have interfered with her ability to perceive, remember, and relate what happened. Accordingly, the court remanded the case for a new trial. *Id*. at 222-23, 902 P.2d at 828-29.

b. Impeaching evidence

"Impeachment evidence generally attacks the credibility of a witness; it is not a process whereby substantive evidence is adduced." *State v. Mincey*, 141 Ariz. 425, 438, 687 P.2d 1180, 1193 (1984). Evidence that is merely impeaching is not "newly discovered evidence" justifying a new trial. *See*, *e.g.*, *State v. Pac*, 175 Ariz. 189, 192, 854 P.2d 1175, 1178 (App. 1993) [evidence that there was another man named "Jim" living in the same trailer park would simply be impeaching because the defendant failed to specify that the other man was involved in the crimes]**;** *State v. Nordstrom*, 200 Ariz. 229, 255, 25 P.3d 717, 743 (2001) [statements and alleged deceitful acts done by defendant's brother are purely impeachment matters and insufficient under Rule 24.2, Ariz. R. Crim. P., to constitute newly discovered evidence.]

4. The evidence must be relevant to the case.

Rule 401, Ariz. R. Evid**.**, defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination

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presentation of cumulative evidence.

of the action more probable or less probable than it would be without the evidence." Under Rule 402, Ariz. R. Evid**.**, "Evidence which is not relevant is not admissible." Evidence in support of a motion for new trial must be relevant to an issue in the case. "On a motion for new trial, evidence is material if it is relevant and goes to substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case. " *State v. Orantez*, 183 Ariz. 218, 221-22, 902 P.2d 824, 827-28.

5. The newly discovered evidence must be such that it would likely have altered the verdict, finding or sentence if known at the time of trial.

If newly discovered evidence would not have made any difference in the result of the proceeding, it is not grounds for a new trial under Rule 24.2 or for post-conviction relief under Rule 32, Ariz. R. Crim. P. *See State v. Bilke*, 162 Ariz. 51, 781 P.2d 28 (1989). For example, in *State v. [Michael] Apelt*, 176 Ariz. 349, 369, 861 P.2d 634, 654 (1993), brothers Rudi and Michael Apelt were convicted of murder, with Michael being tried and convicted first. A doctor at Rudi's trial testified that all of the victim's wounds were made by a right-handed person, and evidence was also presented that Rudi was right-handed and Michael was left-handed. Michael Apelt sought post-conviction relief alleging that the testimony given at Rudi's trial was "newly discovered evidence" entitling him to post-conviction relief. The Arizona Supreme Court found that the evidence presented clearly showed that the brothers acted together in planning the killing, and they both brought the victim to the desert with the intention of killing her**;** it made no difference who had actually wielded the knife. Since the evidence would not have made any difference in the outcome of the proceeding, the defendant was not entitled to any

relief. *Id*.

The trial court is in the best position to evaluate the potential effect that newly discovered evidence would have on jurors. *Soto-Fong*, 187 Ariz. at 196, 928 P.2d at 620. The trial judge, to whom the "newly discovered evidence" is presented, determines whether the evidence is credible. A motion for new trial is properly denied if the testimony of a proffered witness does not appear reliable or credible to the trial court. *Jeffers*, 135 Ariz. at 426, 661 P.2d at 1127; *State v. Serna*, 167 Ariz. 373, 374-75, 807 P.2d 1109, 1110-11 (1991); State *v. Dunlap*, 187 Ariz. 441, 466, 930 P.2d 518, 543 (App. 1996).